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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1543

KENNETH E. POWELL,

Petitioner,

and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party in Interest with Petitioner Powell in Proceedings Below,

v.

CARGILL, INC. and STATE ACCIDENT INSURANCE FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a worker engaged in the unloading of railroad gondola cars bringing grain to a waterfront grain elevator and having no involvement whatsoever

with the loading or unloading of vessels is engaged in "maritime employment" within Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT

This litigation concerns the workers' compensation entitlement of one employee[1] of a Portland, Oregon grain elevator. The individual was hired in early 1973 to work continuously as a "keyman" (i.e., steady employee) and to perform any of the tasks involved in the operation and maintenance of a grain handling facility *except* the loading and unloading of vessels. After nearly seven months of continuous employment having no involvement whatsoever with the genuinely maritime work of vessel loading or unloading, petitioner was injured while opening a railroad gondola car bringing grain to the facility.

Following his injury and while receiving the benefits afforded by the State of Oregon's workers' compensation act, petitioner asserted entitlement to the benefits of the Longshoremen's and Harbor Workers' Compensation Act (the "Act").

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[1] The employee is characterized as a "longshoreman" throughout the Petition. That characterization both presumes the answer to the question presented and is derived from petitioner's membership in the International Longshoremen's and Warehousemen's Union:

> "We find consideration of the purposes (of the Act) more enlightening than looking simply at whether respondents belong to the International Longshoremen's Union. . . . We cannot assume that Congress intended to make union membership the decisive factor. The vagaries of union jurisdiction are unrelated to the purposes of the Act. . . ." *(Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, at 269, Fn. 30 (1977)).

Respondent's denial of that entitlement was upheld by the Administrative Law Judge who, following formal hearing, concluded that

> ". . . petitioner's work was not . . . sufficiently contiguous in time and space as to constitute an integral and interrelated part of the process of conveying cargo to vessels." (Appendix D to Petition, p. 42).

On review, the Benefits Review Board reversed the Administrative Law Judge, concluding that petitioner's duties were

> ". . . the beginning step of a longshoring operation in maritime employment pursuant to Section 2(3) of the Act." (Appendix C to Petition, p. 32).

On further review, the Court of Appeals for the Ninth Circuit reinstated the Administrative Law Judge's findings that petitioner's work activities and duties did not bring him within the coverage of the Act:

> "At the time of the accident, however, Powell had been employed by the same employer performing the same duties for about seven months. Not once during that tenure was he called on to assist directly in the loading or unloading of any ship, nor is there any evidence that such genuine mari-

time work was even contemplated. Powell's attention was directed to the unloading of rail cars as they arrived at the elevator. He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea." (Appendix B to Petition, pp. 12-13).

ARGUMENT

Despite petitioner's attempt to balloon the significance of the Ninth Circuit's decision to affect all bulk cargo facilities of this nation's "rivers, coasts and Great Lakes," this case involves only the Ninth Circuit's application of this Court's decision in *Caputo* to that particular set of facts found by the Administrative Law Judge.

The Petition itself underscores the fact that the work performed by Powell and other similar shoreside grain elevator employees at Cargill's Portland, Oregon facility has "little in common" with other types of bulk cargo operations in other geographic areas. (Petition, pp. 15-16, Fn. 3).

A factual determination regarding the particular work and duties of an employee injured while opening the door to a railroad car at a Portland, Oregon grain elevator will not significantly affect the compensation entitlement of other employees performing different

work under different collective bargaining contracts under conditions having little in common with local practices.[2]

Not only is the Ninth Circuit's decision based on and limited to a specific work situation, it is fully consistent with this Court's decisions in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), and with the few post-*Caputo* decisions issued by several Circuit Courts of Appeal.

I.

There Is No Conflict with Caputo.

The Petition characterizes the Court's decision below as

> ". . . at odds with both the general rationale and the specific analysis of coverage issues in *Blundo* and *Caputo*." (Petition, p. 22).

The characterization is inaccurate. The Ninth Cir-

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[2] The collective bargaining agreement between Cargill and petitioner's local union is separate and distinct from the collective bargaining agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union which controls the employment of the vast majority of West Coast longshoremen performing vessel loading and unloading activities, including many terminal operations, for stevedore companies. Cargill neither loads nor unloads vessels and is not a member of the Pacific Maritime Association. See Tr. 40-41.

cuit's decision is in full conformance with both the letter and spirit of that decision.

The Ninth Circuit's analysis of *Caputo* (which takes up seven pages of the 14-page majority decision appearing at Appendix B of Petition, pp. 3-16), identified and acknowledged the major concerns which this Court found Congress had in mind at the time of the 1972 amendments:

> "The Supreme Court began its analysis with an extensive review of the legislative history of the LHWCA in general and of the 1972 amendments in particular. According to the Court, Congress, in amending the Act in 1972, had two concerns in mind: (1) 'to adapt the LHWCA to modern cargo handling techniques, . . . specifically . . . the impact of containerization,' and (2) 'to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered for only part of their activity.' 45 U.S.L.W. at 4735." (Appendix B to Petition, p. 8).

Moreover, the Ninth Circuit completely adopted this Court's mandate that the Act's coverage be interpreted to avoid "the shifting and fortuitous coverage that Congress intended to eliminate." (Appendix B to Petition, p. 13), recognizing that

> "'. . . when Congress said it wanted to cover "longshoremen" it had in mind persons whose employment is such that they spend at least some

> of their time in indisputably longshoring operations.' 45 U.S.L.W. 4735." (Appendix B to Petition, p. 11).

In reaching its conclusion that work having "no involvement whatsoever with the loading and unloading of . . . ships"[3] was not "maritime employment," and denying petitioner's claim to the Act's benefits, the Ninth Circuit Court of Appeals not only recognized the lessons provided by this Court in *Caputo*, it applied those lessons rigorously.

In *Caputo*, this Court identified two "dominant themes" underlying the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act and the adoption of a "maritime employment" test for compensation entitlement:

> *First*, to extend the Act's coverage shoreward in recognition of the fact that modern cargo-handling techniques had moved much of the longshoreman's work off of the vessel and onto the land; and
>
> *Second*, to assure that a uniform compensation system was applicable to employees who, without the amendments, would have been covered for only part of their work activities.

[3] Appendix B to Petition, p. 13.

The first identified theme is clearly not relevant to petitioner's claim. The use of waterfront grain elevators for the receipt, storage, and later transshipment of inland grown grains involves neither modern cargo handling techniques nor new technological developments.

Application of this Court's second recognized theme — assurance that employees who would otherwise have been covered by the Act for part of their activities be the beneficiaries of a uniform compensation system — demonstrates clearly that the decision below is in full accordance with both *Caputo* and Congress' 1972 intent.

The fact is that *never* during petitioner's seven months of employment with respondent Cargill did he perform any work activities which would have been covered under the Act before the 1972 amendments. During that seven months of employment, petitioner Powell could make no claim to being an "amphibious" worker.[4] The denial of petitioner's claim to the Act's benefits does not revitalize the shifting and fortuitous coverage that Congress intended to eliminate. The Ninth Circuit Court of Appeals decision is fully consistent with *Caputo.*

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[4] "Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to those amphibious workers who, without the amendments, would be covered only for part of their activity." (432 U.S. at 273).

II.

There Is No Conflict with Other Circuit Court Decisions.

Not only is the Ninth Circuit's decision fully consistent with this Court's single decision regarding the scope of the 1972 coverage expansion, it is also fully consistent with the four post-*Caputo* Circuit Court coverage decisions.[5]

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[5] Two of the four pertinent post-*Caputo* decisions have been issued by other panels of the Ninth Circuit Court of Appeals. *Handcor, Inc.* v. *Director, Office of Workers' Compensation Programs,* 568 F.2d 143 (9th Cir. 1978) and *Brady-Hamilton Stevedore Co.* v. *Herron,* 568 F.2d 137 (9th Cir. 1978).

In *Handcor,* a case involving injury to a member of a container "stuffing" gang, the Ninth Circuit found *Caputo* dispositive, concluding that a container stuffer, as well as a stripper,

> ". . . is a maritime employee since the work of a stuffer is the functional equivalent of loading cargo aboard ship." (568 F.2d at 144).

In *Herron,* a case involving injury to an equipment maintenance worker, the Ninth Circuit recognized that claimant Herron was truly "amphibious" and found coverage present because

> ". . . To exclude Herron from coverage in the instant case would be to reinstate the same degree of 'shifting and fortuitous coverage that Congress intended to eliminate.' 432 U.S. at 274, 97 S. Ct. at 2363." (568 F.2d at 140).

The Ninth Circuit has completely adopted this Court's coverage analysis. Petitioner Powell's claim is one for which that analysis precludes coverage.

The two[6] applicable post-*Caputo* coverage decisions, other than those authored by the Ninth Circuit Court of Appeals, are *Dravo Corp.* v. *Banks*, 567 F.2d 593 (3rd Cir. 1977) and *Newport News Shipbuilding & Drydock Co.* v. *Director, Office of Workers' Compensation Programs*, 4th Cir., Docket No. 76-2297, March 13, 1978.[7]

The Third Circuit Court of Appeals was faced with a case arising out of an injury to a plant maintenance worker assigned on the day of injury to spread salt on walkways and steps wherever he saw ice. Coverage was denied because Banks' duties had "no traditional maritime characteristics" and no close functional nexus between Banks' work assignments and the comprehensive shipbuilding operation existed.

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[6] A third decision, issued by the Fifth Circuit Court of Appeals on the day preceding this Court's opinion in *Caputo*, is also pertinent because of this Court's rejection of the employer's petition for certiorari on October 17, 1977. That decision, *Alabama Dry Dock Shipbuilding Co.* v. *Kininess*, 554 F.2d 176 (5th Cir. 1977), cert. den., — U.S. —, — S. Ct. —, 54 L. Ed. 2d 190, is also fully consistent with the views expressed by the Ninth Circuit Court of Appeals. Kininess was injured while sandblasting a disassembled crane to remove rust before reassembling and use in the direct shipbuilding process. As did the Ninth Circuit in *Herron*, the Fifth Circuit Court of Appeals found coverage present because Kininess' maintenance functions were "an essential aspect" of his employer's ship repair and shipbuilding enterprise.

Far from being an "essential aspect" of any longshoring activity, petitioner Powell's work had "no involvement whatsoever with the loading and unloading of ships."

[7] The opinion of the United States Court of Appeals for the Fourth Circuit has been unofficially reported at 8 Benefits Review Board Service (BRBS) 241.

> "Clearing ice is necessary 'incident' of *any* operation. We suggest that in order to be covered, Banks' job should have been a necessary *'ingredient'* in the shipbuilding process, which it was not." (567 F.2d at 595-96).

Application of the Third Circuit's analytic approach to petitioner's claim to the Act's benefits would result in a denial of coverage. Petitioner Powell's work activities had no "close functional nexus" with longshoring.

> "He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea." (Appendix B to Petition, p. 13).

Although a plausible "incident" to any operation requiring the receipt of materials, Powell's work cannot be characterized as a necessary "ingredient" of any longshoring process.

In *Newport News*, the Fourth Circuit Court of Appeals was faced with two claims, one presented by a worker involved in fabricating a component part of a submarine and the other involving a worker injured while maintaining machines used in vessel construction. The Fourth Circuit concluded that both activities were "integral" and "essential" parts of the vessel construction process.

The Ninth Circuit's denial of coverage to Powell — a worker having "no involvement whatsoever with

the loading and unloading of ships" — is fully consistent with the "integral part" test established by the Fourth Circuit Court of Appeals.

Whether viewed as an "ingredient," "integral part," or "essential aspect," it is clear that the Courts of Appeal for three major maritime Circuits have adopted the view that employment is "maritime" within the meaning of Section 2(3) of the Act only if the employment bears a significant relationship to the traditional maritime activities covered by the Act. That view, as expressed by this Court in *Executive Jet, supra,* at 268, has been adopted and followed by the Ninth Circuit in an earlier coverage case under the Act:

> "We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903. See *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). See also *Onley* v. *South Carolina Electric & Gas Company,* 488 F.2d 758 (4th Cir. 1973), and *Crosson* v. *Vance,* 484 F.2d 840 (4th Cir. 1973)." *(Weyerhaeuser Company* v. *Gilmore,* 528 F.2d 957, at 961, cert. den. 429 U.S. 868).

All reviewing Courts have required that the worker's activities bear a significant relationship to the maritime occupational groups covered by the Act.[8] The Ninth Circuit's denial of benefits to petitioner Powell, a worker having "no involvement whatsoever" with any such occupational group, is both consistent with other decisions and clearly correct.

CONCLUSION

The decision below is fully consistent with Congress' 1972 intent, this Court's decisions in *Caputo* and *Executive Jet,* and all post-*Caputo* coverage decisions. The decision reflects an accurate application of *Caputo's* coverage guidelines to a particular work situation. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted this .....day of June, 1978.

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[8] "The Act focuses primarily on occupations — longshoreman, harbor worker, shiprepairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage to these amphibious workers. . . ." (432 U.S. at 273).